"Time Limits in Commercial Contracts – Ignore Them at Your Peril!"

The recent media storm concerning the collapse of Manchester United's transfer deal for its goalkeeper David de Gea apparently as a result of a two minutes delay in submitting the requisite paperwork caused me reflect on the potential effects of missing deadlines in commercial contracts. Man U's problem did not, of course, arise from any term in the transfer agreement itself, but rather from its failure to register the player into the new club through FIFA in accordance with the FIFA Regulations on the Status and Transfer of Players, which postulate a strictly prescribed "registration period" or transfer window in media parlance.

Nevertheless parties to all types of commercial agreement[1] routinely find themselves subject to terms, which require them to render payment or to do other defined things connected to performance or to exercise contractual rights within a limited time period or by a prescribed date. What are the legal consequences if such time limits are breached?

Payment

Legal disputes frequently arise in the context of delayed or missed payments under a commercial contract. The general rule here remains that the time of payment is not generally of the essence of a commercial contract unless the parties have agreed (either expressly or by necessary implication) that it should be. It follows from this rule that the requirement to pay on time (i.e. in accordance with the payment terms prescribed by the contract) is not a condition of the contract, breach of which would permit the innocent party to elect to accept the breach and to bring the contract to an end. Instead the contractual payment provision is likely to be classified as an "innominate term". In what circumstances is the innocent party entitled to bring the contract to an end for breach of such a payment term?

The essential question is whether the breach or threatened breach is such as to justify the summary termination of the contract. The courts have expressed that principle in a number of formulations, most authoritatively as: "did the breach go to the root of the

[1] I am excluding agreements for the sale/purchase of property for present purposes

contract?" or "would the breach deprive the innocent party of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain in consideration for performing his undertaking?"

Such open textured expressions of the principle have rendered its application far from straightforward. The case law shows that its application is highly fact sensitive, and the result will not be easily predicted as is demonstrated by the following cases:-

Decro-Wall International SA v Practitioners in Marketing Ltd [1971] 2 All ER 216
Here the contract imposed an obligation on the defendants to make payment for goods 90 days from the claimant's invoice. The defendants were consistently late in making payment, and the delay consisting typically of between two and twenty days. However, no more than one payment was outstanding at any one time. This state of affairs was set to continue as the defendants funded payments to the claimants from receipts made by onward sales of the claimants' goods. The Court of Appeal held that the breaches did not give the claimants the right to be relieved from further performance of the contract. The rationale for the decision appears to have been that the departure from the contractual payment terms was too insubstantial to be considered as going to the root of the contract. The claimants were in fact receiving payment of every invoice, albeit late. The practical consequence of the defendants' breaches was only that the claimants might incur liability to their bank for a comparatively insignificant sum by way of extra interest, which they were able to recover from the defendants in any event.

By contrast in Alan Auld Associates v Rick Pollard Associates and another [2008] EWCA Civ 655 the claimant was contractually obliged to pay Dr Pollard for his services immediately upon the claimant receiving payment by the UK Atomic Energy Authority for Dr Pollard's work. None of Dr Pollard's invoices were paid on time. Delays in payment ranged from one to nine months and more than half of all his invoices were over four months late. In this case the Court of Appeal derived assistance from the analogy with employment cases in which the late performance of the obligation to pay the employee can be treated as repudiatory. On the facts Tuckey LJ held it to be material that the income from the claimant was Dr Pollard's only source of income and as such the analogy with a contract of employment was a close one. The time for payment lay at the heart of the agreement, and the breaches of the payment term were

"substantial, persistent and cynical" and therefore they were repudiatory and brought the contract to an end.

An analysis of these two leading cases points to a merits based approach by the courts. At the heart of that analysis stands the question of whether, on the particular facts, it would be fair to leave the innocent party merely to a remedy in damages. Recently the Court of Appeal was divided on what the proper result of that analysis should be. In Valilas v Januzaj [2014] EWCA Civ 436 the court ruled two (Floyd and Arden LJJ) to one (Underhill LJ) that despite the claimant's threatened and actual refusal (contrary to the terms of an oral contract) to make defined monthly payments, his refusal to perform his contractual obligations did not amount to repudiatory breaches bringing the contract to an end. The majority considered that on the facts of this case (which allowed for reconciliation of income and apportionment of sums due to the defendant within a 12 month period) the defendant was not deprived of *"substantially the whole benefit of the contract"*. In particular, the trial judge had found that the defendant knew that he would receive everything he was entitled to, albeit late, i.e. that he would not be deprived of substantially the whole benefit of the contract and that lent substantial weight to the conclusion that the defendant was not justified in terminating the contract on the grounds that he had been or would be deprived of substantially the whole of the benefit of the contract. The only likely loss to the defendant as a result of the breaches was the loss of use of the outstanding sums in the meantime. In relation to that loss he could have sought judgment for the sums due together with interest, i.e. he had a remedy in damages, which would fully compensate him. Floyd LJ added as an important factor in the multi factorial analysis carried out by the court that the defendant did not depend on the claimant's payments as his sole income. Underhill LJ, on the other hand, held that the claimant's failure to make three contractually prescribed payments, taken cumulatively, constituted repudiatory breach of the contract. The essential point in his assessment was that the claimant had made a deliberate choice to depart from the agreed contractual arrangements. The claimant had declared to fulfill the contract, *"but in a manner substantially inconsistent with his obligations"* and that was a repudiation. Underhill LJ also remarked that to find otherwise would conduce to uncertainty. I confess to sympathizing with Underhill LJ's decision and comments. What this case shows rather starkly is that the fact sensitive nature of the "substantial benefit" test and the uncertainty inherent in the court's attitude to the "justice" of each case can make it very difficult to

give an early assessment of whether a claim for repudiation of the contract results from breach of payment terms (even if persistent and deliberate) is likely to succeed, or whether, conversely, the innocent party will be limited to a remedy in damages and interest.

Benefit in Lieu of Payment

In the recent case of Man UK Properties Ltd v Falcon Investments Ltd [2015] EWHC 1324 (Ch) (Warren J) an interesting point arose in connection with the enforcement of a contractual term in a joint venture agreement between the claimant ("MUKP") and the defendant ("FI"). The parties had set up a single purpose vehicle company ("FHCL") for the development of a property. It was agreed by the JV partners that MUKP would provide the initial funding to purchase the property (development costs were to be financed by way of bank funding) and have a 49% shareholding in FHC and receive 60% of the profit on sale of the property. FI was to hold the remaining 51% of the shares and receive a 40% of the profit. In relation to the funding advanced by MUKP (£943,250) it was agreed that FI would reimburse 50% of the sum within 6 months of the completion of the purchase of the property. The term in issue was the eighth (and final) bullet point in the JV agreement[2] and provided:-

" … and also if after the eleventh month after completion of the purchase there is outstanding monies for the loan repayment owed by FI to MUKP, then shares in FHC will be transferred from FI to MUKP in lieu of payment"

Early on in his judgment the judge commented that this provision made perfectly good sense, since all the commercial risk was on the person who had actually put up the money to purchase the property, and that the further the project went the more suitable it was that profits should fall where the risk fell.

FI failed to repay the requisite proportion of initial funding to MUKP within eleven months from completion of the purchase of the property. After a falling out of the JV partners over the appointed project manager, MUKP brought a claim for specific performance of bullet point eight in the JV agreement for transfer of 100% of the shares

[2] which had not been professionally drawn

in FHC to it and, in due course, issued an application for summary judgment. One of the arguments made by FI in defence of the specific performance claim was that if MUKP were entitled to specific performance and 100% of the shares, FI would not receive any share in the profits of the development and would lose its entire interest. This was acknowledged by the judge in the context of dealing with the argument made by FI that this was a rather draconian sanction for, say, a one-day default. The judge stated that there was not really anything in that point, since the provisions in bullet point 8 only became effective five months after the final contractual date for payment of the half share, so that even a one day default would in effect be a five month plus one day default. FI further argued that since time was not of the essence in the JV agreement, non-payment could not result in the right to all the shares after eleven months. The judge, correctly, made short shrift of that point in commenting that MUKP wished to enforce the contract, not treat it as repudiated. The alternative argument made by FI was that the right to the shares after the eleventh month was in effect a forfeiture of the defendant's rights as a result of the non-compliance with a term that was not the essence of the contract. The judge ruled that the provision in bullet point eight was not a forfeiture provision, but rather a *"rational and commercial way of dealing with what, in the context of the joint venture, was an important element of the contract between the parties"*.

In the event the judge held that the various defences advanced by FI stood no real prospect of success and ordered specific performance. FI was accordingly deprived of its entire interest in the development profits as a result of failing to make timely payment in accordance with the term in the eighth bullet point of the JV agreement.

Notification Provisions

Another area for potential pitfalls relates to missed deadlines in contractual notification provisions. In Highwater Estates Ltd v Evelyn Graybill [2009] EWHC 1192 (QB) (Judge Waksman QC) the purchaser sued the vendor of a hotel and wedding business for breach of warranty in relation to certain warranties given in a share purchase agreement ("SPA"). The purchaser had given notice of the breach of warranty claim well within the time stipulated by the notification provision for claims in the SPA. However, the notification letter did not make any reference to a misrepresentation claim. Such a claim

was articulated in a further letter from the claimant's solicitors, but much later, by which time the deadline for notification in accordance with the notification provision had expired. The judge held that the notification of the misrepresentation claim came too late for notification purposes, and that accordingly the claimant was debarred from raising any such misrepresentation claim against the defendant. The judge remarked specifically that given that the commercial purpose of a notification clause as in this case was to enable the vendor to know in sufficient detail what he was up against, he could not see how a claim letter which confined itself to breaches of warranty without any reference to misrepresentation at all, could comply with the notification provisions in this SPA. In the event the judge struck out substantial parts of the particulars of claim, disposing of element of the claim accounting for £2,000,000 of a total claim of £2,150,000. Failure to notify misrepresentation strictly within the time limit prescribed by the SPA therefore deprived the claimant of the opportunity to pursue its most valuable claims against the defendant.